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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* THE STATE OF SOUTH CAROLINA AND THE CITADEL, THE MILITARY COLLEGE OF SOUTH CAROLINA IN SUPPORT OF THE COMMONWEALTH OF VIRGINIA, *ET AL.*

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INTERESTS OF AMICI

The State of South Carolina and The Citadel, The Military College of South Carolina are amici whose interests are uniquely affected by this case. South Carolina and Virginia are the only states that currently offer publicly-supported single-sex undergraduate education to men and women. Like VMI, The Citadel is an all-male military college whose admissions policy has been challenged. In response to the Fourth Circuit's decisions in the present case and in its South Carolina counterpart, both South Carolina and Virginia have begun operating all-female leadership programs at the collegiate level.[1]

STATEMENT[2]

South Carolina's litigation began several years after the 1990 challenge made by the United States to VMI's single-sex admissions policy. Unlike the VMI litigation, the challenge to The Citadel's single-sex admissions policy was initiated by an individual plaintiff, Shannon Faulkner. The United States intervened shortly after Faulkner filed her complaint.

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[1] Reported decisions in the South Carolina litigation are as follows: *Faulkner v. Jones*, 858 F.Supp. 552 (D.S.C. 1994), *modified and remanded*, 51 F.3d 440 (4th Cir.), *dismissed as moot*, 116 S.Ct. 331 (1995). *See also, Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (affirming preliminary injunction).

[2] The Statement which follows is centered on South Carolina, whose litigation and factual background are both practically identical to Virginia's.

The Fourth Circuit's liability decision in *Faulkner*, 51 F.3d 440 (4th Cir. 1995) (*"Faulkner II"*) was issued several months after its remedy decision in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*"VMI II"*). The Fourth Circuit in *Faulkner II* rejected an argument based on the absence of demand for an all-female Citadel, which absence the district court had found to be a fact. In *Faulkner II* the Fourth Circuit held that the liability and remedy principles stated in *VMI I* and *VMI II* are applicable to South Carolina. 51 F.3d at 444. In an effort to protect the rights of plaintiff Faulkner, who was by then a rising junior, the Fourth Circuit afforded her the "special, conditional relief" of admission to The Citadel in August 1995 unless South Carolina was able by then to "provide[ ] a parallel program that meets the criteria of *VMI II* and is approved by the [district] court. . . . " 51 F.3d at 450.[3] With regard to women other than Faulkner (there were no other female applicants to The Citadel in the spring of 1995, and there have been only two so far for the class which begins in August 1996), the Fourth Circuit remanded the case, directing the district court to establish a "timely but practicable schedule for South Carolina to formulate, adopt and implement a plan which conforms with the Equal Protection Clause. . . . " 51 F.3d at 450. In practical effect, the district court and the parties have regarded August 1996 as the date by which South Carolina's parallel program must be in place and approved for women other than Faulkner. On November 30, 1995, the

[3] South Carolina, like Virginia, was also given the option of selecting "some other acceptable option, as discussed in *VMI*. . . . " *Id.*

district court stayed the remedy trial in South Carolina's case pending the result of the *VMI* case in this Court.

South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy. As recently as 1970, South Carolina successfully defended the single-gender admissions policy of Winthrop College, then a state-supported college for women, against a claim by men seeking admission to that school. *See Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970) (three-judge court), *aff'd mem.*, 401 U.S. 951 (1971). However, four years later, at the urging of Winthrop's Board of Trustees who cited declining enrollments, South Carolina elected to permit Winthrop to become a coeducational school, which it remains.[4] Thus between 1974 and the early 1990's when the VMI and Citadel litigation began, South Carolina, for the first time since Winthrop became a state school in 1891, was in the position of offering single-sex education to men but not to women. The situation was similar in Virginia, where the last of that state's single-sex colleges for women became coeducational in 1972. *VMI I*, 766 F. Supp. at 1417-1418.[5]

[4] South Carolina Act No. 950 of 1974, § 6, 58 S.C. Stat. 2074, 2076; *see also, Faulkner v. Jones*, 858 F. Supp. 552, 556 (D.S.C. 1994).

[5] In the context of this case, it is easy to lose sight of the states' provision for women in higher education generally. In South Carolina in 1993, for example, there were nearly 10,000 more women than men attending the state's public colleges. *See Faulkner*, 858 F. Supp. 552, 560 (32,642 women and 22,831 men). The same pattern occurred with regard to State support of private colleges, made in the form of tuition grants to students; as a

The challenges to the admissions practices of VMI and The Citadel in the early 1990's made it apparent that a twenty-year practice which had started as an accident of history might present a constitutional dilemma. As a result, the South Carolina General Assembly reexamined its commitment to single-gender education. In a 1993 Concurrent Resolution, the General Assembly reiterated its support of single-gender education, appointing a study committee "to assist the State . . . in carrying out its responsibilities of providing single-gender educational opportunities for women. . . . " *See Faulkner, supra,* 858 F. Supp. at 560. The study committee in 1994 suggested that these responsibilities might be met, *inter alia,* by offering a parallel program through a compact with a private women's college. *Id.*

In 1995, the South Carolina General Assembly codified its public policy concerning single-gender education as follows:

> A. The General Assembly finds that some students, both male and female, benefit from attending a single-gender college. For these students, the opportunity to attend a single-gender college is a valuable experience, likely to lead to better academic and professional achievements. The General Assembly therefore adopts the findings of fact in U.S. v. Commonwealth of Virginia, 44 F.3d 1229, 1232, 1238 (4th Cir. 1995) that "single-gender education at the college level is beneficial to both sexes." Further, in that single-gender education is both beneficial and

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general rule, over 60% of the private college students receiving those State tuition grants are women.

> justifiable, the General Assembly finds that providing opportunities for students to attend a single-gender college fulfills an important and legitimate state objective, and therefore declares and stipulates that it is the public policy of the State to support the establishment and maintenance of single-gender programs of higher learning for both sexes. Single-gender offerings to both men and women need not be identical in form and detail, but should be designed to produce substantively comparable outcomes.
>
> B. The General Assembly shall annually provide such funding as may be necessary, under the auspices of the Commission on Higher Education, to establish and maintain approved single-gender offerings.[6]

After the decisions in *VMI II* and *Faulkner II*, South Carolina entered into an agreement with Converse College, a private college in Spartanburg, South Carolina, for Converse to host the parallel program. Converse College has been an all-female college since its founding in 1889. In two statutes enacted in 1995, the State provided initial funding of a total of $3.4 million ($2 million for capital improvements and $1.4 million for annual operating costs).[7] In addition, The Citadel by contract made an initial payment of $5 million to Converse, to be followed

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[6] South Carolina Act No. 145 of 1995, Part II, §§ 95(A), 95(B), 69 S.C. Stat. 900, 1460-1461. Section 95(C) of Part II of the above act provides that if the Supreme Court reverses the Fourth Circuit's decision in *VMI II*, Section 95 "shall be void and of no effect."

[7] South Carolina Act No. 145 of 1995, 69 S.C. Stat. 900, 995, 1251-52; South Carolina Act No. 146 of 1995, 69 S.C. Stat. 1487, 1491.

by a total of at least $1.6 more if court approval is obtained.

The parallel program created at Converse (The South Carolina Institute of Leadership for Women (SCIL)) was patterned on the VWIL program at Mary Baldwin College. It shares the missions and goals of The Citadel, but uses a non-adversative methodology. The SCIL Program opened in August 1995 with twenty-two initial participants (of whom nineteen are freshmen) who are now near the end of their first semester.

Concluding that discovery could not be completed in time for the merits of the parallel program to be reviewed this past summer, the district court declined to undertake such review prior to the August 1995 date when The Citadel's incoming Corps of Cadets reported. Former plaintiff Faulkner reported to The Citadel as a prospective member of the Corps of Cadets on August 12, 1995. Two days later, she entered the infirmary. After spending five days there, she voluntarily withdrew from The Citadel.

The district court dismissed Faulkner's complaint as moot on October 3, but permitted another individual plaintiff to intervene on the same day. The hearing on the constitutionality of SCIL has been stayed pending this Court's decision in *VMI*. Converse College, however, continues to recruit women to enter SCIL in the fall of 1996.

SUMMARY OF ARGUMENT

The record in this case shows that single-sex education is undeniably beneficial to some students. Likewise, the record shows that women who seek leadership education would not attend an all-female VMI, and no expert for either side suggested that VMI's adversative method was a recommended educational methodology for women.

The courts below correctly concluded that Virginia's single-sex education policies were based on observable facts rather than stereotypes. The court of appeals correctly determined that in the special context of single-gender education, equality of treatment would not result from requiring coeducation or an all-female leadership program which is identical to the one offered to men.

ARGUMENT

The Court of Appeals correctly balanced the need to accord equality to both sexes with the important state interest in single-sex education.

A. Single-gender education serves an important state interest.

The record shows the agreement of both sides' experts that some students, both male and female, benefit from attending a single-sex college. Petitioner's expert Astin concluded that:

> Single-sex colleges show a pattern of effects on both sexes that is almost uniformly positive.

> Students of both sexes become more academically involved, interact with faculty frequently, show large increases in intellectual self-esteem, and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions.

VMI I, 976 F.2d 890, 897, *quoting* I JA 1830. After quoting several other studies to the same effect, the Fourth Circuit in *VMI I* observed that "[t]he experts for both sides in this case appear to agree with the conclusions reached in these studies." *Id.*[8] In accord with the views of its experts, petitioner did not appeal the findings of fact concluding that single-gender education was valuable. The findings could not reasonably have been reversed as "clearly erroneous" even had they been appealed.

A 1990 survey of alumni of The Citadel as part of the American College Testing Association's alumni survey reinforces these conclusions that students at single-sex colleges "are more satisfied with practically all aspects of the college experience." Citadel alumni were more than twice as likely as their average counterparts from similarly-sized colleges nationwide to report that the quality of education at their college is better than at other colleges. Among the things they believe The Citadel taught them to do better than alumni of most other colleges were "working independently," "working on [their] own,"

[8] In *VMI II*, the Fourth Circuit noted "that single-gender education at the college level is beneficial to both sexes is *a fact established in this case.*" 44 F.3d at 1238 (citing 766 F. Supp. at 1411-12) (emphasis added). *See also*, 766 F. Supp. at 1434-1435 (Findings of Fact VII.B 7 through VII.B 14).

"following directions," "working cooperatively in groups," "defining and solving problems," "planning and carrying out projects," "persisting at difficult tasks," "leading/guiding others," "organizing [their] time effectively," and "recognizing [their] rights, responsibilities, and privileges as citizens." While most studies of the benefits of single-gender colleges understandably focus on women's colleges, inasmuch as there are only five non-religious single-sex colleges for males, The Citadel alumni survey provides clear and convincing empirical evidence that single-gender colleges benefit men as well as women. South Carolina believes that similar results can be achieved for female graduates of the SCIL program.

B. The remedy in this case was based on valid observations about the psychological and developmental needs of women and men and on expert opinion about the methods of leadership education responsive to those needs.

1. The result in this case will inevitably be based on a generalization.

It is well settled that education, even elementary education, is not an entitlement which the State must offer its citizens. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973). However, it is axiomatic that when the state offers a benefit to its citizens, it must make that benefit available to all citizens on an equal basis.

In this case, of course, the difficult question is what constitutes equal treatment of men and women in the context of specialized state-supported higher education

programs. Regardless of how this Court decides this case, the decision will reflect and embody a choice among several conflicting generalizations concerning women, particularly women who are about to enter college. None of these generalizations is universally true, but the need to choose one over the others is inescapable.

Virginia based its single-gender women's leadership program on the finding, supported by unambiguous statistics and a nearly-unanimous body of expert opinion based thereon, that the psychological and developmental needs of most women entering college vary significantly from those of most men. Using this as their basis, the experts designed an all-female leadership training program which was responsive to the demonstrated needs of prospective participants. Virginia, in agreeing to sponsor a single-gender leadership training program for women, accepted the experts' conclusions that a different methodology can and should be used to produce the same outcome as VMI. The desired outcome for both women and men is that the leadership training and experience developed in college will equip them to fill leadership roles in later life.[9]

Petitioner, on the other hand, urges reliance on the false and unsupported generalization that the very small number of women who would choose to attend VMI should be regarded as the paradigm for all women seeking leadership education in college. Petitioner argues that

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[9] The evidence in both cases strongly indicates that if the states had chosen to create all-female military institutions, such institutions would soon have closed because of lack of demand. *VMI*, 852 F.Supp. at 481 n.12; *Faulkner*, 858 F.Supp. at 860.

in the context of higher education, equal treatment means identical treatment: in petitioner's view, all college-age men and women should be regarded as approaching leadership training in higher education from the same standpoint of the few women who desire coeducational adversative leadership training. Any other result, petitioner says, would be based on "harmful sex-role stereotypes" which in turn are founded on "invalid assumptions." Br. of Pet. at 16, 19 (page proof version). Petitioner's view would require Virginia and South Carolina to tailor their state-supported leadership programs accordingly, forcing all women who desire state-supported leadership training to be limited as a practical matter to receiving it in a coeducational setting which uses the adversative method.[10] In other words, petitioner argues that if even one woman wants coeducational leadership training, it does not matter if all other women and men are precluded from receiving the benefits of public single-gender education.[11]

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[10] There are several reasons why the admission of women to VMI would probably have the practical effect of eliminating the option of state-supported single-sex education. In all likelihood, a decision that VMI must be made coeducational would effectively render unconstitutional the continuation of the VWIL program or any other state-supported single-gender program of higher education. As a result, Virginia would have to choose whether to let VMI become a private college or whether to operate only the coeducational VMI. A decision requiring VMI to admit women would therefore greatly diminish, and probably eliminate, the chances of women receiving a state-supported single-sex leadership education.

[11] Tailoring state-supported higher education leadership programs to accommodate every individual's preferences would lead to the absurd result of a state sponsoring at least six

2. Classifications based on reasoned analyses are necessary and constitutional bases for allocating state resources.

This Court has previously held that the Constitution permits generalizations about groups of persons when such policies are "a product of analysis rather than a stereotyped reaction based on habit." *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 582-83 (1990) (internal quotation marks and citations omitted).[12] (This Court's recent decision in *Aderand Contractors, Inc. v. Pena*, 115 S.Ct. 2097 (1995) does not undermine *Metro Broadcasting*'s analysis about what is permitted under the intermediate scrutiny

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separate programs: two coed programs using the methods of VMI and VWIL, respectively, and four single-sex programs (two male programs using VMI and VWIL methods, and two female programs using VMI and VWIL methods).

[12] *Metro Broadcasting* approved a classification which placed all members of one race into a single group. The dissenting Justices contended that such a classification was improper because "the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class." 426 U.S. at 602 (O'Connor, J., dissenting) (emphasis in original) (citations and internal quotation marks omitted). The present case, however, demarks the limit of the extent to which that view may be valid. In *Metro Broadcasting*, no one within the class was directly harmed by attributing a set of characteristics to the class as a whole. Here, however, a result which is based only on recognizing the claims of the few individual women who seek an adversative coeducational state-supported leadership education will practically, if not legally, terminate the rights of a larger group of individuals within the same class, i.e., those women for whom public single-gender education is beneficial. The individual claims of one set of members in the class will in this case inevitably be overridden by the individual rights of another set of members of the same class.

test). As *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) holds, gender-based classifications must be rejected when they embody "fixed notions concerning the roles and abilities of males and females" or "archaic and stereotypic notions." 458 U.S. at 725. Stated differently, such classifications must be rejected if made "unthinkingly" or "reflexively." *Rostker v. Goldberg*, 453 U.S. 57, 72, 74 (1981).

The only generalization in this case which is based on an unreasoned, unverified stereotype is that made by petitioner. It is a relatively new stereotype rather than an "archaic" one, but if is a stereotype nonetheless. Nothing is gained by substituting a new stereotype for an old one when both are equally in error. The few women who seek admission to VMI and The Citadel thus should no more be regarded as the paradigm for all women than should any women who still would prefer not to fulfill some societal roles because of a belief in their "natural and proper delicacy and timidity. . . . " *Bradwell v. State*, 16 Wall. 130, 141 (1872) (concurring opinion).

This Court has rejected gender stereotypes which contain only "a shred of truth," or when there is but "some statistical support can be conjured up for the generalization." *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1427 n.11 (1994). *J.E.B.* did not, however, announce an absolute rule rejecting gender-based differences in treatment in all cases. The Court instead simply held that a "measure of truth" *alone* cannot justify support treating the sexes differently. Moreover, the "shred of truth" in the generalizations rejected in prior cases was, as the term implies, not overwhelmingly representative of the psychological and developmental differences between men

and women, as here.[13] Petitioner, not Virginia, seeks to inflate a mere shred of truth into a general constitutional principle.

In the context of racial classifications, this court has been willing to adopt "a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." *Brown v. North Carolina*, 479 U.S. 940, 941-42 (1986) (O'Connor, J., concurring in denial of certiorari and referring to *Batson v. Kentucky*, 496 U.S. 79 (1986)). South Carolina submits that accepting petitioner's contentions in the present context will move matters dangerously far away from "a statement of fact," and in so doing will make a most undesirable "statement about what this Nation stands for."

3. There is no reasonable dispute that few women would benefit from a coeducational VMI.

Petitioner's desire to force all women who seek state-supported single-gender education into the mold of the few women who may wish to attend a coed VMI is neither logical nor supported by the evidence. The record clearly establishes that there are significant psychological and developmental differences between men and women as they enter college. Petitioner's own experts have

[13] There was virtually no factual support presented for the generalization about women urged upon the Court in *J.E.B.*, in contrast to the near-unanimity in this record with regard to the real differences in the ways men and women achieve the outcome of being trained to lead in today's society.

observed this indisputable fact, as shown by the following statement by Petitioner's expert Astin, reflecting the compilation of student answers to questionnaires:

> [W]omen enter college already differing considerably from men in self-rated emotional and psychological health, standardized test scores, GPA's, political attitudes, personality characteristics, and career plans. . . .

II DX 104 at 405 (II JA 278; L. 346). Astin further described several of these observed gender differences in persons entering college as follows:

> Some of the largest gender differences occur in the area of psychological well-being. * * * There are also many gender differences in cognitive development.

Id. at 404-405 (II JA 278; L. 346). Other experts called by Petitioner reinforced these observations. *See, e.g.*, I Tr. 377 (I JA 625) ("there clearly are differences between men and women, and not only the obvious physiological ones. . . . ").[14]

The experts who designed the VWIL program concluded that these differences would make any parallel program modelled on VMI unlikely to succeed. The reasons for the likely lack of success, they concluded, were twofold: an all-female program based on VMI would attract little interest,[15] and as a result, it would fail to turn out women leaders in any appreciable quantity even if it

[14] There will probably never be an end to the debate over the causes of these differences, but they clearly are present before women ever get to college.

[15] *VMI II*, 852 F.Supp. at 481 n.12.

could be kept in operation. As the court below summarized the record:

> The possibility of adopting the adversative methodology to women, setting woman against woman with the intended purpose of breaking individual spirit and instilling values, could succeed only if it is true that women, subjected to the same grating of mind and body, respond in the same way men do, and only then if a sufficient number of women necessary to make such a program work desired to participate in the program. Educational experts for the Commonwealth testified that women may not respond similarly and that if the State were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work. The United States did not offer sufficient evidence to lead us to conclude that the Commonwealth's expert testimony was clearly erroneous in this regard.

VMI II, 44 F.3d at 1241.

In contrast to the bleak prospects for an all-female VMI, the experts concluded that the VWIL program would have substantial positive consequences for Virginia's women. Harvard sociologist David Reisman testified that

> [g]iven the women now coming to higher education, what is offered in VWIL is a model for the country, with potentially enormous consequences to reverse the unhappy, often unequal, output of education.

II JA 474. Dr. Elizabeth Fox-Genovese noted that having a publicly-supported single-sex education program for

women is important because the private colleges which offer single-sex education to women are usually very expensive, thereby placing this option out of reach of many or most women. II JA 291.[16]

Finally, petitioner's argument implicitly assumes that the adversative system and the hierarchical leadership style which follows from it are inherently superior to systems of learning and leadership based on empathy and interdependence. The former is defined (some say culturally defined) as "masculine," and the latter as "feminine."[17] The present reality is that most women respond to one and most men to the other. Whether this present reality is simply cultural in most individuals or is more deeply rooted, Virginia and South Carolina have sought to respond to the situation which presently exists. This entire case has been characterized by petitioner's unspoken claim, more denigrating to women than could

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[16] Research continues to affirm the efficacy of single-gender colleges for women. A very recent report from UCLA (in which the authors acknowledge "assistance and commentary" by Professor Astin) cites findings that attending a women-only college "has a positive effect on students' academic ability" and that women's colleges provide opportunities to develop "social self-confidence," which in turn may "provide a long-term foundation for higher proportions of career achievers" compared to their co-educational counterparts. The authors conclude that "public policy makers would be well advised to continue support for women-only colleges." Kim and Alvarez, *Women-Only Colleges, Some Unanticipated Consequences*, 66 J. Higher Educ. 641, 661-662 (1995).

[17] These concepts are discussed more fully, although from a position opposing Virginia's position, at pp. 24-25 of the brief of amici American Association of University Professors, *et al.*

be claimed of any state policy, that of the two methods only those used by VMI and The Citadel can train women to be effective citizens and leaders.

C. Equality of treatment is served in this case by single-sex programs whose equality is attained by comparability in substance rather than by identity of methodology.

This case does not present simply another instance of admitting women to an area from which they have been improperly barred. It is far different from most prior gender discrimination cases, where the only practical result was to benefit all women, or at least those who chose to be benefitted, without injury to the interests of any other women, much less most women within the class originally subjected to discrimination.

The easiest answer for this Court would be simply to accept the Petitioner's argument, and accordingly to require VMI and The Citadel to admit women if the schools are to remain state-supported. This, however, would permit the claims of a tiny minority of women to trump the interests of practically all women and men interested in state-supported single-gender education. The court below wisely rejected such a facile result; instead it correctly recognized that in this situation, equal treatment does not and should not mean identical treatment.

The court below determined that the standard intermediate scrutiny test in gender discrimination cases would not work in a case such as this where both prongs

of the test (an important state interest and a means substantially related to its achievement) could be satisfied while still possibly leaving unaddressed the claims of women to a similar state-sponsored benefit. The court's recognition that the standard test was inadequate to protect the rights of the gender claiming discrimination led the court to impose a third requirement: that when state action validly serves an important state interest in offering a benefit to one gender, the state must offer the other gender a benefit comparable in substance. 44 F.3d at 1237. This test balances the need for equality with the recognition that identity would be of little practical value if almost no one stood to benefit under such a definition of equality. The court's test also avoids eliminating a program found to serve an important state interest through means substantially related to that end.

In creating parallel programs for women, Virginia and South Carolina have recognized their responsibility under the Equal Protection Clause. The two states clearly did not intend to discriminate against women when they discontinued single-gender programs for women in the early 1970's while VMI and The Citadel continued to exist. By seeking to remedy this brief historical anomaly, Virginia and South Carolina tried to avoid the dual extremes of creating a female VMI or Citadel which would likely fail, or of creating programs which would limit their graduates to occupations representing former stereotypes. Instead, the States have sought to offer to women leadership programs which were designed to maximize the chances that their graduates would have overcome whatever barriers to effective leadership they may have faced upon entering college. The states are

endeavoring to do this by making the benefits of single-sex education available to both sexes, thereby affording to both sexes the enhanced opportunity which single-sex education provides for learning self-discipline, teamwork, and the practice of leadership. Coeducation is merely one among several methods of education. It should not be elevated to the level of a constitutional imperative.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the court below should be affirmed.

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